

advocacy. The revised definition in 11 CFR 100.22(a) includes a somewhat fuller list of examples. The expressions enumerated in *Buckley*, such as "vote for," "Smith for Congress," and "defeat" have no other reasonable meaning than to urge the election or defeat of clearly identified candidates.

3. Communications Lacking Such Phrases

The NPRM also addressed communications that contain no specific call to take action on any issue or to vote for a candidate, but which do discuss a candidate's character, qualifications, or accomplishments, and which are made in close proximity to an election. An example is a newspaper or television advertisement which simply states that the candidate has been caring, fighting and winning for his or her constituents. Another example is a case in which a candidate is criticized for missing many votes, or for specific acts of misfeasance or malfeasance while in office.

Under Alternative A-2, these types of communications would have constituted exhortations if made within a specified number of days before an election, and if they did not encourage any type of action on any specific issue, such as, for example, supporting pro-life or pro-choice legislation. Comments were requested as to what an appropriate time frame should be—as short as 14 days, or as long as six months, prior to an election, or some other time period considered reasonable.

Some commenters opposed treating these communications as express advocacy on the grounds that there is not a clear call to action. Others argued that such communications, particularly when made by a candidate's campaign committee, were clearly intended to persuade the listener or reader to vote for the candidate.

Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question. The revised rules do not establish a time frame in which these communications are treated as express advocacy. Thus, the timing of the communication would be considered on a case-by-case basis.

4. Communications Containing Both Issue Advocacy and Electoral Advocacy

The final rules, like the proposed rules, treat communications that include express electoral advocacy as express

advocacy, despite the fact that the communications happen to include issue advocacy, as well. Several comments pointed out that the legislative process continues during election periods, and argued that if a legislative issue becomes a campaign issue, the imposition of unduly burdensome requirements on those groups seeking to continue their legislative efforts and communicate with their supporters is unconstitutional. These concerns are misplaced, however, because the revised rules in section 100.22(b) do not affect pure issue advocacy, such as attempts to create support for specific legislation, or purely educational messages. As noted in *Buckley*, the FECA applies only to candidate elections. See, e.g., 424 U.S. at 42–44, 80. For example, the rules do not preclude a message made in close proximity to a Presidential election that only asked the audience to call the President and urge him to veto a particular bill that has just been passed, if the message did not refer to the upcoming election or encourage election-related actions. In contrast, under these rules, it is express advocacy if the communication described above urged the audience to vote against the President if the President does not veto the bill in question.

Nevertheless, to alleviate the commenters' concerns, the definition of express advocacy in new section 100.22(b) has been revised to incorporate more of the *Furgatch* interpretation by emphasizing that the electoral portion of the communication must be unmistakable, unambiguous and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages election or defeat of candidates or some other type of non-election action.

Both alternative definitions of express advocacy included consideration of the context and timing of the communication, and indicated that communications consisting of several pieces of paper will be read together. Several commenters and witnesses were troubled by the perceived vagueness and uncertainty inherent in the use of the phrases "taken as a whole," "in light of the circumstances under which they were made," and "with limited reference to external events." They argued that they would not be able to ascertain in advance which facts and circumstances would be considered by the Commission. Some of the commenters and witnesses acknowledged the difficulty of crafting a clear and precise standard in the First Amendment context.

The final rules in section 100.22 retain the requirement that the communication be read "as a whole and with limited reference to external events" because *MCFL* makes clear that isolated portions of a communication are not to be read separately in determining whether a communication constituted express advocacy. See 479 U.S. at 249–50. Further, the *Furgatch* opinion evaluated the contents of the communication in question "as a whole, and with limited reference to external events." 807 F.2d at 864. The external events of significance in *Furgatch* included the existence of an upcoming presidential election and the timing of the advertisement a week before the general election. However, please note that the subjective intent of the speaker is not a relevant consideration because *Furgatch* focuses the inquiry on the audience's reasonable interpretation of the message. *Furgatch*, 807 F.2d at 864–65.

5. "Vote Democratic" or "Vote Republican"

In the NPRM, Alternative A-2 treated as express advocacy messages such as "Vote Republican" or "Vote Democratic" if made within a specified period prior to a special or general election or an open primary. Again, comments were sought on time periods ranging from 14 days to 6 months prior to an election, or any other time period considered reasonable. Alternatively, the period between the primary and general elections was suggested as the time when such messages refer to clearly identified candidates. In contrast, Alternative A-1 treated these phrases as express advocacy if made at any time after specific individuals have become Republican or Democratic candidates within the meaning of the FECA in the geographic area in which the communication is made. The NPRM also sought comments on when a message such as "Vote Democratic" or "Vote Republican" refers to one or more clearly identified candidates, rather than being just a message of support for a party.

The views of the commenters and witnesses reflected little consensus regarding these messages. Several were supportive of Alternative A-2, and suggested that a 90 day time frame would be appropriate. Others felt that such messages are always express advocacy because they aim at influencing the outcome of elections. Conversely, some commenters argued that these messages cannot be express advocacy if there are no declared candidates yet running for the party's